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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1385

MARTIN SPAGAT and POLK BROS., INC., an Illinois Corporation, both Individually and in a Representative Capacity,

Petitioners,

vs.

GEORGE MAHIN, as Director of Revenue, ALAN J. DIXON, Successor to ADLAI E. STEVENSON, III, as State Treasurer, and WILLIAM J. SCOTT, as Attorney General of the State of Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondents, George Mahin, Director of Revenue, Alan J. Dixon, State Treasurer, and William J. Scott, Attorney General of the State of Illinois, respectfully pray that a writ of certiorari to review the judgment of the Illinois Supreme Court entered in this case, holding the sale and installation of wall-to-wall carpeting to be a sale at "retail" and not the sale of a "service," be denied.

OPINION BELOW

The judgment of the Illinois Supreme Court was entered on November 30, 1971, and the petitioners' petition for rehearing was denied on January 27, 1972.

QUESTIONS

Is the Illinois Supreme Court's classification of the business of selling installed wall-to-wall carpeting to be a retail sale and not a sale of a service when a Retailer's Occupation Tax is assessed on the sale of wall-to-wall carpeting, less installation costs, a denial of due process and equal protection of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioners contend that the Illinois Supreme Court's opinion violates the Constitution of the United States, Fourteenth Amendment, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Section 1 of the Retailer's Occupation Tax Act (Ill. Rev. Stat. 1961, Ch. 120, Par. 440) provides in pertinent part:

"A person who holds himself out as being engaged (or who habitually engages) in selling tangible personal property at retail is a person engaged in the business of selling tangible personal property at retail hereunder with respect to such sales (and not primarily in a service occupation) notwithstanding the fact that such person designs and produces such tangible personal property on special order for the purchaser and in such a way as to render the property of value only to such purchaser, is such tangible personal property so produced on special order serves substantially the same function as stock or standard items of tangible personal property that are sold at retail."

Service Occupation Tax Act (Ill. Rev. Stat. 1961, Ch. 120, § 439.103) provides for a tax:

". . . upon all persons engaged in the business of making sales of service (hereinafter referred to as servicemen) at the rate of 3% of the cost price of all tangible personal property transferred by said serviceman either in the form of tangible personal property or in the form of real estate as an incident to a 'sale of service' . . ."

Section 439.33 of the Service Use Tax Act provides for a tax:

". . . upon the privilege of using in this State real or tangible personal property acquired as an incident to the purchase of a service from a serviceman."

• • •

"'Sale of Service' means any transaction except: (1) a retail sale of tangible personal property taxable under the Retailer's Occupation Tax Act . . . or under the Use Tax Act . . ." (Ch. 120, Secs. 439.32, 439.102).

STATEMENT OF THE CASE

Plaintiff Spagat purchased wall-to-wall carpeting from Plaintiff Polk Bros., Inc., who sells both over-the-counter carpets and special order wall-to-wall carpeting. He paid $607.65 for his carpeting and was charged $30.88 as a tax, pursuant to the Use Tax Act. An additional $120.33 charge for installation was not subjected to any tax. He filed a complaint in chancery on his own behalf and on behalf of all others similarly situated, alleging that the imposition of the Use Tax Act on this transaction was erroneous since Polk Bros., Inc. was a "serviceman" under the definitions contained in the Service Occupation Tax Act and that said transaction did not constitute a sale at "retail" pursuant to the Retailer's Occupation Tax Act. Plaintiff Polk Bros., Inc., intervened in this action in its own behalf and members of its class. The trial court held that Polk Bros., Inc. was a serviceman and that the transaction was subject to the Service Occupation Tax Act and Service Use Tax Act, but did not rule on the constitutional issues contained in the plaintiff's complaint that the imposition of a tax in this transaction constituted a violation of the equal protection of the laws and due process clauses of the State and Federal Constitutions. On appeal, the Illinois Supreme Court reversed the trial court and held that the transaction was subject to the Use Tax Act and that the imposition of the tax for the sale of the carpeting was not an unconstitutional attempt to bring this occupation within the Act. The Court determined that the "wall-to-wall" carpeting and carpeting purchased "over the counter" serve substantially the same function. It is from this decision that petitioners seek a writ of certiorari.

REASONS FOR DENYING WRIT

The single issue involved herein is whether the petitioners are a "retailer-purchaser" or "serviceman-user of services" under the definitions of the Acts in question. The Illinois Supreme Court has determined that the sale of "wall-to-wall" carpeting is a "sale at retail" and not the sale of a service. It held that the sale of wall-to-wall carpeting was subject to the same rate of tax as the sale of "over-the-counter" carpeting. The cost of installation of the carpeting was not subject to any tax at all.

Initially it should be remembered that the Retailers' Occupation Tax Act is not a tax on the privilege of buying or upon an individual sale, but rather is imposed on the business of selling tangible personal property at retail. The real occupation of the taxpayer must be observed to determine liability. *J. H. Walters & Co.* v. *Department of Revenue*, 44 Ill. 2d 95; *Central Television Service, Inc.* v. *Isaacs*, 27 Ill. 2d 420; *Automatic Voting Mach. Corp.* v. *Daley*, 409 Ill. 438; *Ingersoll Mill Mach. Co.* v. *Department of Revenue*, 405 Ill. 367.

Polk Bros. Inc. is a retailer. Retailing is its major function. The petitioners admit that Polk Bros. Inc. holds itself out as a "retailer of Floor Covering" and that it "Habitually engages in" said occupation (Abst. 9). In addition, notice should be taken that Polk. Bros. Inc. is one of the largest "Retailers" in the State of Illinois, for courts will take judicial notice of that which everyone knows to be true. *People* v. *Tassone*, 41 Ill. 2d 7; *Owens* v. *Green*, 400 Ill. 380.

The petitioners recognized the problem created by the true nature of petitioner Polk's occupation and have attempted to create a fiction by suggesting the existence

of Polk the "Retailer" and Polk the "Serviceman." The General Assembly and the Department of Revenue also recognized that situations may arise in which retailers may attempt to change hats in order to avoid taxation. Thus the Legislature specifically provided for such a contingency by amending Section 1 of the Retailers Occupation Tax Act in 1961 for the express purpose of eliminating this distinction. They indicated their intention in the Preamble to said amendment as follows: (Session Laws, 1961, Senate Bill 566, p. 1741):

> "WHEREAS, certain items of tangible personal property are sometimes produced and sold at retail as stock or standard items and sometimes are custom-made (produced on special order) to meet the particular requirements of the purchaser so as to be of value to such purchaser, and
>
> "WHEREAS, such specially made items are competitive to and serve the same function as items of a stock or standard nature, but have not heretofore been considered by the Courts to be subject to the same tax as the stock or standard items, and
>
> "WHEREAS, the General Assembly intends that there shall not be discrimination in the application of this Act between retail sellers of stock or standard items of tangible personal property and retail sellers of custom-made items of tangible personal property where both kinds of tangible personal property serve substantially the same function and thus involve an element of competition."

and to achieve this equality which the General Assembly created, the Department of Revenue interpreting Section 1 as amended, stated that the installation charges for wall-to-wall carpeting were excluded if stated separately (Rule 20 of the Rules and Regulations of the Department of Revenue).

The 1961 amendments to Section 1 of the Retailers' Occupation Tax Act and Section 2 of the complementary Use Tax Act broadened the tax base and the Court held that these amendments together with Rule 20 adopted by the Illinois Department of Revenue include the type of transaction involved herein since "wall-to-wall" carpeting and "over-the-counter" carpeting serve substantially the same purpose, i.e., a floor covering.

The petitioners contend that the decision of the Illinois Supreme Court violates the Fourteenth Amendment, Section 1, of the Constitution of the United States. It is respectfully submitted that no part of said decision is violative of this constitutional provision since it holds that if an over-the-counter item serves substantially the same purpose as a custom-made item, the tax base and treatment thereof are identical. If the Illinois Supreme Court had held otherwise it would have been a violation of this constitutional provision and the Constitution of the United States since a person who could not afford to purchase "custom-made" items would bear a greater share of tax responsibility than one who could afford to purchase same. The former would be denied "equal protection" under the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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